No. 2620.

IN THE

United States Circuit Court of Appeals

FOR THE NINTH CIRCUIT.

THE SAN FRANCISCO BREWERIES, LTD., (a Corporation),

Plaintiff in Error,

vs.

SYLVIA A. BRAINARD,

Defendant in Error.

BRIEF FOR DEFENDANT IN ERROR

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I.

The five assignments of error relied upon by the plaintiff in error involve substantially only a single question considered from different points of view, namely, whether or not the record discloses any evidence tending to support the verdict. If there was in fact presented by the evidence a question for the jury, as to whether the injury sustained by the plaintiff below, defendant in error in this Court, was or was not attributable to negligence on the part of the plaintiff in error, there can be no doubt that no error was committed by the trial Court in refusing to order a nonsuit, or in giving or refusing to give any of the

instructions referred to in the assignments of error. That there was at least some evidence introduced at the trial to the effect that one or more of the employees of the plaintiff in error had been guilty of negligence which was the proximate cause of the injury sustained by the defendant in error seems to us too clear for argument.

Before taking up in detail the several assignments of error discussed by counsel for plaintiff in error we desire, at the risk of seeming to urge a proposition too elementary to be open to question, to refer to one fundamental rule which must govern the decision of any such case as the one at bar, not as a case involving damage caused by runaway horses, but as a case involving negligence as a question of fact.

Definitions of negligence expressed in almost every conceivable variety of phraseology may be found in the works of text-writers and in the opinions of judges, but all such definitions, however differently worded, have this feature in common that all of them necessarily presuppose some sort of standard of conduct by reference to which the existence or absence of negligence is to be determined. In by far the largest number of situations which arise in actual human experience the law does not attempt to prescribe in any definite, specific, or precise terms any particular standard of conduct. In reference to cases falling within the class referred to, which in fact includes as stated by far the largest number of cases actually occurring, all that the law attempts to prescribe in the way of a standard of conduct is expressed in the

rule that every person, in order to avoid the consequences attaching to an imputation of negligence, must in any given situation conduct himself as a reasonable and prudent person would ordinarily have conducted himself under like circumstances. (*Railroad Company* v. *Jones,* 95 U. S. 439, 441.) As was stated in *Farrell* v. *Waterbury Horse R. R. Co.,* 60 Conn. 239, 248-9; 21 Atl. 675, 677; "the law cannot say beforehand how the man of ordinary prudence would act, or ought to act, under all or any probable set of circumstances." There exists a very large class of cases in which the very question to be determined is how a man of ordinary prudence would act under a given set of circumstances, and in which this question must necessarily be submitted to a jury, simply because the question cannot be answered as a question of law. (*McCully* v. *Clark,* 40 Pa. St. 399.) In every case falling within the class referred to there are always at least two questions to be asked and answered, and generally three such questions, namely, first, what were in fact the circumstances? and then, assuming all dispute as to the circumstances to be eliminated; second, what would have been the conduct of a reasonable and prudent person under such circumstances? and finally, did the conduct of the person under investigation conform to what would have been under such circumstances the conduct of a reasonable and prudent person? Each of these three questions, including especially the question, what would have been the conduct of a reasonable and prudent person under similar circumstances, is essentially

a question within the exclusive province of a jury to determine. (*Davidson S. S. Co.* v *U. S.,* 205 U. S. 187, 190-191.)

One of the leading cases on this subject is *The Sioux City & Pacific R. R. Co.* v. *Stout,* 17 Wall. 657. That case turned entirely on the question whether the trial Court had erred in submitting the question of negligence to the jury. It was contended that, since the facts were undisputed, the question of negligence was one of law to be passed upon by the Court, and that the trial Court ought to have ordered a nonsuit. Replying to this contention the Supreme Court said (17 Wall. 657, 661-3):

> "Unless the defendant was entitled to an order that the plaintiff be nonsuited, or, as it is expressed in the practice of the United States Courts to an order directing a verdict in its favor, the submission was right. If upon any construction of the evidence which the jury was authorized to put upon the evidence, or by any inferences they were authorized to draw from it, the conclusion of negligence can be justified, the defendant was not entitled to this order, and the judgment cannot be disturbed. To express it affirmatively, if from the evidence given it might justly be inferred by the jury that the defendant . . . had omitted that care and attention to prevent the occurrence of accidents which prudent and careful men ordinarily bestow, the jury was at liberty to find for the plaintiff. . . . The evidence was not strong and the negligence is slight, but we are not able to say that there is not evidence sufficient to justify the verdict."

The Court then referred to different classes of cases, in some of which the inference of negligence from

the facts established is so certain that such inference may be ruled as a matter of law, and in others of which on the contrary the Court is justified in ruling as a matter of law that there is no negligence and no liability. After referring to these extreme cases, the opinion continues as follows (17 Wall. 663-4):

> "But these are extreme cases. The range between them is almost infinite in variety and extent. It is in relation to these intermediate cases that the opposite rule prevails. Upon the facts proven in such cases, it is a matter of judgment and discretion, of sound inference, what is the deduction to be drawn from the undisputed facts. Certain facts we may suppose to be clearly established from which one sensible, impartial man would infer that proper care had not been used, and that negligence existed; another man equally sensible and equally impartial would infer that proper care had been used, and that there was no negligence. It is this class of cases and those akin to it that the law commits to the decision of a jury.
>
> "Twelve men of the average of the community, comprising men of education and men of little education, men of learning and men whose learning consists only in what they have themselves seen and heard, the merchant, the mechanic, the farmer, the laborer; these sit together, consult, apply their separate experience of the affairs of life to the facts proven, and draw a unanimous conclusion. This average judgment thus given it is the great effort of the law to obtain. It is assumed that twelve men know more of the common affairs of life than does one man, that they can draw wiser and safer conclusions from admitted facts thus occurring than can a single judge."

Among the numerous cases in which this fundamental principle has been the basis of decision is one of the cases cited in the opening brief for the plaintiff in error herein, *Garlick* v. *Dorsey,* 48 Ala. 220. That case turned entirely on the question whether error had been committed by refusing to give at the request of the plaintiff an instruction to the jury that "if they believed from the evidence that the injury . . . was attributable to neglect on the part of the defendant then the plaintiff was entitled to recover."

The evidence was to the effect that the horse which ran away had been for eight years gentle and kind and had never run away before, although frequently left unattended. On the occasion in question the defendant had left the horse unattended for a few minutes, but there was no evidence as to what caused it to run away. There was no evidence of careless or negligent driving by the defendant. The jury returned a verdict for the defendant, but the judgment was reversed on account of the refusal to give the requested instruction quoted above.

II.

As to the First Assignment of Error.

The contention that the trial Court erred in not ordering a nonsuit involves in reality, as explained by counsel for the plaintiff in error themselves, (pp. 17-19 of their brief,) two subsidiary contentions, first, that there was no evidence that at the time when the team which ran away started to run it was under the

management or control of the defendant or of any of its agents, servants or employees, and second, that, whether or not the first contention be sound, at any rate there was no evidence that the running away was caused by any negligence on the part of the defendant or of any of its agents, servants or employees. We submit that both of these contentions are equally untenable.

(1) As regards the first of these subsidiary contentions, counsel for the plaintiff in error have very little to say. The question for consideration is not whether the team had in fact been delivered to and accepted by its owner, Thun, but whether the evidence before the jury was such that it can be said there was no evidence from which the jury could find that the team had not yet been delivered to Thun. The only evidence referred to as tending to show that such a delivery had taken place is the testimony of Thun that one of the employees of the defendant said to him, the team being then still harnessed to a wagon belonging to the defendant, and standing on the premises of the defendant: "There is your team, it is ready for you." And that Thun after an interval said: "I guess I'll have to unhitch and go home." (Pages 43-4 of Printed Transcript.) Notwithstanding these remarks made to and by Thun the jury was certainly justified in taking into consideration the indisputable fact that at the time of the runaway the team had not yet been unhitched from the wagon, and that therefore the first statement that the team was ready to be delivered to its owner was not true, to say nothing

of the fact that, after the remark made by Thun as quoted above, Crow, the man who during the day had been driving the team, said to Thun: "I'll unhitch them for you," as well as the fact that Thun testified in connection therewith that it was Crow's place to unhitch the horses. (Page 44 of Printed Transcript.)

The utmost that the evidence can legitimately be claimed to prove is that both on the part of the employees of the defendant and on the part of Thun there had been expressed a willingness that Thun should take delivery of the team. That did not, however, amount to a delivery of the team to Thun. There is no principle of law which makes a willingness on the part of two persons, even though entertained by both of them at the same time, or even a deliberate intention shared by both of them, to the effect that a delivery of personal property be made from one of such persons to the other, equivalent to an actual delivery. (*Cochrane* v. *Moore,* 25 Q. B. D. 57.) In any event it is impossible to say that there was no evidence that the team had not yet been delivered over from the management and control of the defendant to that of Thun.

(2) In support of the second of these subsidiary contentions counsel for the plaintiff in error have cited a number of cases, none of which however bear out their contention in this regard.

In *Shawhan* v. *Clarke,* 24 La. An. 390, it was properly held as a matter of law that the defendant had not been guilty of negligence. The facts upon which

that ruling was based were that the defendant's horse, immediately before it ran away, was securely tied and under the charge of a stable boy, and that a vehicle drawn by another horse, which was running away, ran into the defendant's horse, while it was so tied and watched, and caused it also to run away. In other words, instead of being a case of an unexplained runaway, or a case in which there was any room for question as to negligence on the part of the defendant, there was an affirmative explanation of the occurrence which exonerated the defendant.

In *Coller* v. *Knox,* 222 Pa. St. 362; 71 Atl. 539; where a judgment of nonsuit was affirmed, the Court pointed out that the only evidence as to the facts of the occurrence was the testimony of the plaintiff himself, who testified that a few minutes before the collision he saw the defendant's horses standing in a private lane with a man standing at their head, and that when next he saw them they were running away in a public road some distance from where he had first seen them. There was no explanation whatever as to what had happened in the meantime. It was properly held that such evidence as there was, instead of affording any ground for an inference of negligence, affirmatively showed that the defendant had taken a reasonable precaution to prevent the happening of a runaway.

O'Brien v. *Miller,* 60 Conn. 214; 22 Atl. 544; is another case in which a judgment of nonsuit was affirmed. The plaintiff was run over by a horse belonging to the defendant which was being driven

by an employee of the defendant, but was running away and was beyond the control of its driver. There was no evidence as to what had caused the horse to run away, but it was proved that at the time when the horse struck the plaintiff the driver of the horse was exerting his utmost skill to prevent the horse doing any injury to the plaintiff. All that was said by the Court in that part of the opinion which is relied upon by counsel for the plaintiff in error in the case at bar was said in response to the untenable contention advanced by the plaintiff in that case, (upon which the Court said that his whole claim rested,) that the mere fact that the defendant's horse was running away, without any explanation, was in itself evidence from which the jury might find negligence. In another part of the opinion, however, the Court said (60 Conn. 217):

> "If, however, it is claimed only that the fact of the horse running away affords a presumption of fact that there was negligence on the part of the defendants, then of course it must be taken in connection with the other facts. There is the fact that the horse had previously been frightened when near the cars and had become unmanagable. This fact is not of itself evidence of negligence, although it might call for increased care on the part of the driver. And then there is the fact proved that at the time of the collision the driver was exercising the highest care to prevent injury. This, so far from showing negligence, is positive evidence the other way."

The other cases relied upon by counsel for the plaintiff in error in this connection, including *Rowe*

v. *Such,* 134 Cal. 573, and also *Button* v. *Frink,* 51 Conn. 342, from which counsel have quoted on page 20 of their brief, may be grouped together.

The proposition involved in these cases is presented in a clean-cut form in *Creamer* v. *McIlvain,* 89 Md. 343; 43 Atl. 935. The facts of that case were as follows:

Two gentlemen of Baltimore were returning from a roadhouse to the city in a buggy drawn by a pair of spirited horses owned by one of them and being driven by the other, who had frequently driven them before. At a distance of half a mile from the roadhouse one of the horses became frightened at an electric car and jumped against the other, and the two started to run. About a quarter of a mile further on they ran into a vehicle which the appellants were driving, they also being on their way from the same roadhouse to Baltimore. There was no evidence of negligence in the management of the horses after they left the roadhouse. The complaint contained two counts, one predicated upon the theory of negligence, the other upon the theory that the injury complained of had been caused by the proneness of the horses to become uncontrollable, and that that quality of the horses had been fully known to the defendants before they started from the roadhouse. The trial Court directed a verdict for the defendants on each count, and the judgment was affirmed. There was no evidence in the case to support the theory of the second count any more than there was any evidence of negligence in the management of the horses.

So far as concerned the cause of action pleaded in the first count of the complaint in *Creamer* v. *McIlvain,* the facts of that case fully demonstrate the propriety of the rule there enforced. It is obvious that horses may and do run away, however carefully driven, and therefore, since it is a matter of common experience that a horse may be caused to run away by an infinite variety of causes other than negligence on the part of the person driving it, the mere fact that a horse, while being driven, runs away, there being no explanation as to what caused the horse to start running, affords no evidence of negligence on the part of its driver. When damage has been done by a runaway horse, in order to justify an inference of negligence in the management of the horse on the part of a person in charge of it, there must be at least some evidence of the circumstances under which the horse started to run. This is all that was decided in *Rowe* v. *Such*, 134 Cal. 573.

The distinction between inferring negligence from the mere fact that a horse is running away *with its driver* and inferring negligence in a case where the evidence discloses that a team of horses were running away *without a driver* was clearly pointed out in *Button* v. *Frink,* 51 Conn. 342. In such a situation the rule is just the opposite of the rule which applies when the only fact proven is that a horse was running away with its driver.

McMahon v. *Kelly,* 9 N. Y. S. 544.

III.

As to the Second and Fifth Assignments of Error.

With regard to the contentions that the trial Court erred in refusing to direct a verdict for the defendant and in permitting judgment to be entered in favor of the plaintiff, it is sufficient to say that in whatever manner the evidence be analysed the most that counsel for the plaintiff in error can claim to have shown is that the evidence bearing upon the question of negligence was conflicting. They have not shown, and it is impossible to say, that there was no evidence of negligence on the part of any employee of the defendant.

The first and second grounds urged by counsel for the plaintiff in error in support of the second assignment of error are mere repetitions of the two contentions urged in support of the first assignment of error. It is obvious that the additional evidence introduced on the part of the defendant, consisting of testimony of the employees of the defendant, did not wipe out the testimony previously introduced on the part of the plaintiff, and at the most left the evidence conflicting on all points covered by the testimony on the part of the plaintiff.

The third ground urged in support of the second assignment of error is predicated upon a certain ordinance of the City of Oakland introduced in evidence by the defendant, and upon the contention that at the time when the horses ran away they were fastened

in strict accordance with said ordinance. The ordinance referred to requires that where a team of horses are not otherwise securely hitched, as to a post or other suitable fastening, the brake must be set, "and the lines or reins so fastened that the wagon cannot be drawn forward . . . except by means of the lines or reins".

It is questionable whether, even assuming the testimony of the employees of the defendant to have been true, the manner of fastening the reins to which they testified constituted a compliance with the ordinance in question, because all that they testified to was that the reins were tied back to a rod at the back of the seat, the driver, Crow, testifying that they were pulled back "pretty tight". It is obvious that if the reins had been fastened back, as required by the ordinance, so that the wagon could not have been drawn forward except by means of the reins, it would have been a physical impossibility for the horses to drag the wagon for any considerable distance, and all the more so if the brake had been set as required by the ordinance, and therefore it would seem that in any view of the testimony the ordinance was not complied with. But, waiving the question whether or not the testimony of the employees of the defendant, even assuming that testimony to have been true, showed a compliance with the ordinance referred to, certainly the jury were justified in taking into consideration, as negativing that testimony, the undisputed facts that the horses did run away, and did drag the wagon half the length of a city block, and that they were stopped only by

running into a building. The jury were also justified in taking into consideration the conflicting statements of the different witnesses as to whether or not the wheels were dragging, and more particularly the fumbling attempts of the driver, Crow, to explain what he had done with the reins, and how it happened that, if they were securely fastened as required by the ordinance, and as claimed by him and his fellow employees, one of them came loose. We submit that the assumption that the evidence showed without contradiction that the ordinance referred to had been complied with is an assumption without any warrant in the record.

Furthermore, the argument of counsel for the plaintiff in error on this point involves the fallacy of assuming that the only possible theory on which the defendant could be charged with negligence is that the horses had not been properly fastened. There was considerable evidence before the jury to the effect that, regardless of whether or not the horses had been fastened in the manner prescribed by the ordinance referred to, the real cause of their running away was negligence on the part of the driver, Crow, either in the manner of his approaching the team immediately before they ran away, or in the manner in which he handled the reins after he had approached the team. He himself attempted to explain his conduct in these particulars, but there was also testimony to which the jury were justified in giving consideration, with regard to statements made by him shortly after

the accident, which were altogether inconsistent with his testimony at the trial.

IV.

As to the Third Assignment of Error.

The objection to the instruction complained of in the third assignment of error is predicated upon two grounds, each of which is based upon an assumption not warranted by the record.

The first of these grounds is merely a repetition of the first contention urged in support of the first assignment of error, namely, that the evidence conclusively proved that the management and control of the team had been delivered to Thun. We contend that the evidence proved the contrary, but we submit that there was at least some evidence from which the jury could justifiably find that up to the time when the horses ran away the defendant had not yet parted with the management and control of them. The jury were not instructed that the defendant did have control of the horses. The question whether the control of them had been turned over to Thun was explicitly submitted to the jury in another part of the instructions. (Printed Transcript, pp. 116, 119-120.) The second ground of objection urged against the instruction complained of in the third assignment of error assumes that the evidence conclusively proved that the horses were fastened in accordance with the city ordinance heretofore discussed, whereas, as we have shown, there was very persuasive evidence to the effect that the horses had not been so fastened.

V.

As to the Fourth Assignment of Error.

The instruction requested by the defendant, which is recited in the fourth assignment of error, was properly refused. The request for that instruction seems to have been predicated upon the theory that, if the ordinance referred to was complied with, that fact precluded any possible inquiry as to whether the defendant had been negligent in the matter of fastening the horses. There is no principle or rule of law which would support any such theory. The defendant was allowed to introduce the ordinance in order that, as explained at the time by its counsel, the jury might have a basis for determining whether the defendant had been negligent in regard to the method adopted of fastening the horses. (Printed Transcript, pp. 106-7.) That was the utmost extent to which the ordinance could properly be considered as bearing upon the question of negligence. Failure to comply with the ordinance in any situation to which the ordinance applied would doubtless give rise to a presumption of negligence, but there is no principle or rule of law to the effect that compliance with any such statutory requirement necessarily negatives negligence even in regard to the subject-matter of such requirement. The correct principle is stated in *Farrell* v. *Waterbury Horse R. R. Co.,* 60 Conn. 239, 247; 21 Atl. 675, 676; as follows:

> "Where the law itself prescribes and defines beforehand the precise, specific, conduct required under given circumstances, the standard by which

such conduct is to be judged is found in the law. When, in such a case, the conduct has been ascertained, the law, through the court, determines whether the conduct comes up to the standard. The rules of the road, some of the rules of navigation, and the law requiring the sounding of the whistle or the ringing of the bell of a locomotive approaching a grade crossing, at a specified distance therefrom, may serve as instances of this kind. Of course, if, in cases of this kind, one of the parties injures another, he is not necessarily absolved from blame by showing a compliance with the specific rule of law, for it may be that while so doing he neglected other duties which the law imposed upon him."

VI.

We submit that no sufficient ground has been shown for disturbing the verdict, and that the judgment of the United States District Court should be affirmed.

Respectfully submitted,

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